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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. RICHARD RIOS HERRERA, Defendant and Appellant.	E047091 (Super.Ct.No. RIF132649) OPINION

APPEAL from the Superior Court of Riverside County. Ronald L. Taylor, Judge. (Retired judge of the Riverside Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.). Affirmed.

Rex Williams, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, and Barry Carlton and Elizabeth A. Hartwig, Deputy Attorneys General, for Plaintiff and Respondent.

On March 22, 2007, following a jury trial, defendant Richard Rios Herrera was convicted of one count of stalking (Pen. Code,[1] § 646.9, subds. (a), (c)), and one count of burglary (§ 459). On September 28, 2007, defendant admitted he had served two prior prison terms (§ 667.5, subd. (b)), had previously been convicted of a serious felony (§ 667, subd. (a)), and had one prior strike (§§ 667, subds. (c), (e)(1), 1170.12, subd. (c)(1)). He was sentenced to state prison for a total term of 14 years. Defendant appeals, contending: (1) there is insufficient evidence to support either of his convictions of stalking and burglary; (2) the court erred in instructing the jury with CALCRIM No. 372; (3) the court erred in failing to instruct the jury, sua sponte, on the elements of theft; (4) the court erred in failing to give the unanimity instruction; and (5) the true finding on his prior strike and section 667, subdivision (a), allegations should be reversed because he was not advised of the consequences of his admission.

I. FACTS

A. The Prosecution's Case

Michelle Miller (Miller) and defendant dated for seven years and have two children together, R. (born in 1993), and J. (born in 1998). The relationship involved domestic violence. Consequently, defendant has been convicted of the following: (1) misdemeanor battery against Miller in 1995; (2) felony terrorist threats and misdemeanor vandalism against Miller in 1996; (3) corporal injury on Miller in 1996 and 2002; (4) felony stalking of Miller in 2005; and (5) making annoying telephone calls to

[1] All further statutory references are to the Penal Code unless otherwise indicated.

Miller in 2005. Miller has convictions for possession of methamphetamine for sale, welfare fraud, and receiving stolen property. After giving up methamphetamine use, she became a substance abuse counselor.

From December 30, 2004, to June 11, 2006, defendant was physically absent from Miller's life. Defendant returned in late June 2006, and Miller allowed him to see the children because they wanted a relationship with their father. From July 2006 to September 26, 2006, Miller was living with her mother, her mother's boyfriend, and her children. Sometimes, Miller allowed defendant to come over to the house during daytime hours, but "not in the middle of the night." Nonetheless, frequently, Miller would wake up in the middle of the night to find defendant in her bedroom standing over her, lying on the floor next to the bed, lying beside her in the bed, or hiding behind a bedroom or bathroom door. He did not have permission to be there, and Miller repeatedly told him to get out of the house. Miller's boyfriend also caught defendant "creeping around" in the backyard late at night. Approximately 10 or 15 times, Miller called the police, but other times defendant would leave without giving her a difficult time.

Miller denied giving defendant a key to the house, and she did not think her mother had given a key to him. According to Miller, defendant would not accept the fact that their romantic relationship was over, and the more she resisted him, the more he persisted in harassing her. Because of defendant's actions, Miller obtained a domestic violence restraining order against him.

One morning, when Miller could not find her cell phone, her daughter said that she had seen defendant that morning standing behind the bathroom door. Eventually, Miller

got her cell phone back, after continually going to defendant's mother's home and asking her help. Finally, defendant returned the cell phone.

Miller's son would get into trouble, and Miller would ask defendant for help. On September 25, 2006, Miller drove defendant to an Econo Lodge where Miller and the children were staying temporarily. She wanted him to counsel their son because he had been suspended from school for possession of marijuana. However, the next morning, as Miller was getting into the car, defendant appeared and grabbed her keys. Miller was angry and scared, and she called the police. Officer Bryan Galbreath of the Riverside Police Department responded to the call.

Miller was scared when defendant would show up and not say anything to her, because he carried a knife and had slashed her tires several times. Miller had reported those incidents to the police. According to Miller, defendant was "like Jekyll and Hyde." Sometimes he would call her and disguise his voice, sounding "scary." She was not that frightened, because it was over the telephone. Other times when Miller needed defendant's help in parenting, defendant would be willing to help, but according to Miller, defendant had the ulterior motive of wanting to be close to her rather than helping with parenting.

At some point in time, defendant and another male arrived at the house to "beat up" Miller's boyfriend. Defendant "ripped off the door of the bedroom." Allegedly, this happened at Miller's son's behest, because her boyfriend was not being nice to him. Miller testified that defendant would send threatening text messages to her, such as "187" or "666," or messages containing long silences on the answering machine. In one

telephone message, he asked her, "Are you ready to die?" She recognized his voice even when he tried to disguise it, and she reported it to the police the next day. She would have been more frightened if he had made the threat in person; however, she was upset that the children had to listen to their father threatening her in the telephone messages because it "violated" them.

Officer Eric Meier was aware there was a "wanted" flyer out on defendant. On September 30, 2006, the officer drove to defendant's last known address and saw him standing in the driveway. Defendant fled, and Officer Meier and his partner pursued. The partner told defendant to stop, but defendant kept running. The officers followed defendant to a house they suspected he had entered, they knocked on the door, and a female directed them to the back of the house. Defendant was found hiding inside a bedroom closet and was arrested.

Officer David Hammer responded to Miller's call that defendant was in her home; however, when the officer arrived, defendant was not there. The same thing happened to Officer Phillip Sears on August 21, 2006. Officer Sears responded to Miller's call reporting that defendant was in her home; however, when the officer arrived, defendant was not there.

B. The Defense

Miller lived with her children in a home rented by her mother. Her mother saw defendant come to the residence to visit the children, and she was aware that Miller had a restraining order against defendant. Miller's mother gave defendant permission to come and go whenever he needed to and left a key under the mat for him. However, sometimes

when there was a problem with Miller, her mother would ask defendant not to come. In June, her mother told defendant not to come at nighttime. According to her mother, Miller would have defendant there when she needed him, and when she did not, she told him to get out. Miller's mother was not at the house between Mondays and Thursdays.

Defendant would bring his children to his mother's home. Miller would call, asking and looking for defendant. On one occasion between June and September 2006, defendant's mother saw Miller sitting on the bed with defendant standing and talking to her. The children were not present. Defendant's mother asked Miller why she was there and told her to leave.

C. Rebuttal

On December 29, 2004, Officer Richard Aceves was dispatched to Miller's mother's home regarding a violation of a restraining order. Defendant was suspected of violating the restraining order, but he was not located. The officer returned several times, but each time, defendant was not there. Eventually, defendant was located, and Officer Aceves conducted a search incident to arrest and located a key. The key matched Miller's house key.

D. Judicial Notice

The trial court took judicial notice of the following matters: In 1995 defendant was convicted of misdemeanor battery against Miller. On May 5, 1996, defendant was convicted of "terrorist threats," in violation of section 422, and of misdemeanor vandalism; Miller was the victim. In 1996 defendant was convicted of felony infliction of corporal injury on a spouse or cohabitant, in violation of section 273.5. In 2002

defendant was convicted of misdemeanor infliction of corporal injury on a spouse or cohabitant, in violation of section 273.5. In 2005 defendant was convicted of felony stalking of Miller, in violation of section 646.9. In 2005, defendant was convicted of making annoying telephone calls to Miller, in violation of section 653m, subdivision (b).

E. Stipulation

From December 30, 2004, to June 11, 2006, defendant was not physically capable of being anywhere near Miller's home.

II. SUFFICIENCY OF EVIDENCE

A. Standard of Review

"The standard of review is well settled: On appeal, we review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] '"[I]f the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder."' [Citation.] 'The standard of review is the same in cases in which the People rely mainly on circumstantial evidence. [Citation.] "Although it is the duty of the [finder of fact] to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the [finder of fact], not the appellate court which must be convinced of the defendant's guilt beyond a reasonable doubt."' [Citation.]" (*People v. Snow* (2003) 30 Cal.4th 43, 66.)

B. Stalking

Defendant contends the evidence is insufficient to support his conviction of stalking. Specifically, he argues that "no evidence shows [he] terrorized Miller and caused her substantial emotional distress."

Section 646.9, subdivision (a), defines stalking. Stalking consists of (1) repeatedly following or maliciously harassing another person; (2) making a credible threat; (3) threatening with the intent to place that person in reasonable fear of her safety, or the safety of her family. (§ 646.9, subd. (a).) (See *People v. Ewing* (1999) 76 Cal.App.4th 199, 210, citing *People v. Carron* (1995) 37 Cal.App.4th 1230, 1238.) This case was tried on a theory of harassment. "Harassment" is defined as "a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, torments, or terrorizes the person, and that serves no legitimate purpose." (§ 646.9, subd. (e).) "Course of conduct" means "two or more acts occurring over a period of time, however short, evidencing a continuity of purpose." (§ 646.9, subd. (f).)

The testimony of Miller supports a jury finding of each of the elements of the crime of stalking. Miller testified that defendant came to her home in the middle of the night without her consent. He did this approximately 25 times a month during the relevant period of time. He hid in the home and lay on the floor by her bed or in it with her. Although he was there when she needed him to help with the children, she opined that he had the ulterior motive of wanting to be close to her, not to help with parenting. He sent her threatening text messages and left messages on her answering machine. He stipulated to prior convictions for various kinds of domestic violence offenses ranging

from annoying telephone calls to stalking and physical assault occurring over the preceding decade.

Miller testified that defendant's actions placed her in reasonable fear for herself and her children. On several occasions defendant slashed her tires. While she was not in fear when defendant threatened her over the telephone, it was only because he was not physically standing in front of her. However, his middle-of-the-night appearances, coupled with the fact that he carried a knife, caused Miller to fear for herself and her children. On one occasion, defendant came to the house with a friend to beat up Miller's boyfriend.

Given the record before this court, the actions of defendant constitute harassment within the meaning of section 646.9, subdivision (e).

Section 646.9 requires that defendant not only harass the victim, but he must make a credible threat with the intent to place that person in fear for her safety or the safety of her children. "Credible threat" is defined as "a verbal or written threat, including that performed through the use of an electronic communication device, or a threat implied by a pattern of conduct or a combination of verbal, written, or electronically communicated statements and conduct, made with the intent to place the person that is the target of the threat in reasonable fear for his or her safety or the safety of his or her family, and made with the apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for his or her safety or the safety of his or her family. It is not necessary to prove that the defendant had the intent to actually carry out the threat." (§ 646.9, subd. (g).)

In *People v. Falck* (1997) 52 Cal.App.4th 287, 297-298, the court concluded it is not necessary to prove that the defendant intended to carry out the threat as long as the threat caused the victim to reasonably fear for her safety and the safety of her children. (See also *People v. Carron, supra,* 37 Cal.App.4th at pp. 1238-1240; *People v. Halgren* (1996) 52 Cal.App.4th 1223, 1231.) In this case, defendant's bizarre conduct, including slashing Miller's tires, taking her cell phone and car keys, numerous texts and calls with threatening messages or silence, entering into Miller's house while she was asleep, and beating up Miller's boyfriend, were more than enough to place a reasonable person in fear for her safety and the safety of her children.

The testimony of Miller provided substantial evidence upon which the jury could conclude defendant was guilty of felony stalking.

Defendant's claim that the evidence was insufficient to establish Miller suffered "substantial emotional distress" as a result of his conduct is misplaced. In 2002, "suffer substantial distress" was deleted from the definition of stalking. (§ 646.9, stats. 2002, ch. 832, § 1.) Accordingly, CALCRIM 1301 does not require a showing that defendant's conduct caused substantial emotional distress.

C. Burglary

Burglary requires an entry into a specified structure with the intent to commit theft or any felony. (§ 459; *People v. Tafoya* (2007) 42 Cal.4th 147, 170.) The entry need not be a trespass and may be made with the consent of the owner or occupant, as long as the necessary intent exists at the time of the entry into the building or a room therein. (*People v. Frye* (1998) 18 Cal.4th 894, 954, overruled on other grounds in *People v.*

Doolin (2009) 45 Cal.4th 390, 421, fn. 22; *People v. Sparks* (2002) 28 Cal.4th 71, 88 [burglary includes entry into a room within a house, if intent to commit felony is formed before entry into the room, although after entry into the house itself].)

Defendant contends the evidence is insufficient to support his conviction of burglary. Specifically, he argues that: (1) there is no evidence he "entered the Miller residence [with] the intent to take [her] cell phone or to permanently deprive her of it"; and (2) there is no evidence he "entered with an intent to threaten Miller to fear for her safety." We disagree. The jury reasonably concluded that defendant was stalking Miller. He repeatedly came into her home at night without her permission. He took her cell phone, which in today's society where everyone relies on cell phones, amounts to harassing conduct. There was evidence that defendant ripped the door off the bedroom. In addition, Miller's boyfriend caught defendant "creeping around" in the backyard late at night. There was sufficient evidence to establish that defendant entered Miller's home with the intent to commit a felony, i.e., stalking. (*People v. Prince* (2007) 40 Cal.4th 1179, 1258.)

III. CALCRIM No. 372

Defendant challenges the trial court's decision to instruct the jury with CALCRIM No. 372 over his objection. He contends the instruction "violates due process and [his] right to a jury trial because it tells the jury a crime was committed, thereby eliminating the presumption of innocence, lowering the burden of proof and depriving the defendant of a jury verdict." Moreover, defendant argues that, because there was no evidence of

flight from the crime, "the instruction misguided the jury by allowing it to draw an improper inference . . . ."

A. The Instruction

Over defendant's objection, the jury was instructed as follows: "If the defendant fled or tried to flee immediately after the crime was committed, that conduct may show that he was aware of his guilt. If you conclude that the defendant fled or tried to flee, it is up to you to decide the meaning and importance of that conduct. However, evidence that the defendant fled or tried to flee cannot prove guilt by itself." (CALCRIM No. 372.)

B. Standard of Review

"In reviewing the purportedly erroneous instructions, 'we inquire "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way" that violates the Constitution.' [Citations.] In conducting this inquiry, we are mindful that '"a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge."' [Citations.]" (*People v. Frye*, *supra*, 18 Cal.4th at p. 957.)

C. Analysis

Recently, our colleagues in the Third District rejected a similar challenge to the constitutionality of CALCRIM No. 372 in *People v. Paysinger* (2009) 174 Cal.App.4th 26 (*Paysinger*). We agree with their analysis: "Even viewing the instruction in isolation, the word 'if' in the operative clause—'If the defendant fled or tried to flee immediately after the crime was committed'—does not logically modify *only* the phrase 'the defendant fled or tried to flee,' as defendant contends. Rather, 'if' modifies the entire

phrase, including the words 'after the crime was committed.' Thus, it is highly unlikely a reasonable juror would have understood the instruction as dictating that 'the crime was committed.' [Citation.]" (*Id.* at p. 30.)

As in *Paysinger*, our conclusion is supported by other instructions given to the jury, which told them that (1) they must decide what the facts are; (2) they must decide what happened; (3) defendant is presumed to be innocent; and (4) the presumption of innocence requires the People to prove defendant guilty beyond a reasonable doubt. (*Paysinger*, *supra*, 174 Cal.App.4th at p. 30.) Moreover, as we have already discussed, the record contains substantial evidence upon which the jury could conclude that defendant was guilty of felony stalking. As such, it is not reasonably likely the jury misunderstood the phrase "the crime was committed" in the flight instruction so as to relieve the prosecution's burden or undermine the presumption of innocence.

Regarding defendant's claim that the differences in the language in CALCRIM No. 372 versus the language in section 1127c[2] further support his argument that the instruction is unconstitutional, we again find the analysis in *Paysinger* applicable. "Defendant first points out that CALCRIM No. 372 tells the jury that flight may show awareness of guilt before telling the jury that flight alone is not sufficient to prove guilt,

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[2] "In any criminal trial or proceeding where evidence of flight of a defendant is relied upon as tending to show guilt, the court shall instruct the jury substantially as follows: [¶] The flight of a person immediately after the commission of a crime, or after he is accused of a crime that has been committed, is not sufficient in itself to establish his guilt, but is a fact which, if proved, the jury may consider in deciding his guilt or innocence. The weight to which such circumstance is entitled is a matter for the jury to determine. [¶] No further instruction on the subject of flight need be given." (§ 1127c.)

while Penal Code section 1127c communicates those ideas in the opposite order. To the extent defendant suggests this difference makes the CALCRIM instruction constitutionally deficient because the first sentence of the instruction 'strongly suggests . . . that evidence of flight is in fact sufficient to show guilt,' we are not persuaded. The first sentence of CALCRIM No. 372 suggests no such thing, and in any event the final sentence of the instruction positively refutes any such suggestion. In reviewing an instruction for constitutionality, we do not view it in isolation from the other instructions the court gave and we certainly do not view one part of an instruction in isolation from another part. Viewed as a whole and in light of the other instructions, CALCRIM No. 372 is not unconstitutional.

"Next, defendant complains that while Penal Code section 1127c 'in no way tells the jury how it should interpret flight, if proved, nor what conclusion it may draw from the fact of flight,' CALCRIM No. 372 'tells the jury flight may prove guilt.' . . . It has long been accepted that if flight is significant at all, it is significant because it may reflect consciousness of guilt, which in turn tends to support a finding of guilt. [Citation.] That CALCRIM No. 372 tells the jury this does not in any way make the instruction unconstitutional.

"Finally, defendant complains that while Penal Code section 1127c 'addresses flight "*after the commission of a crime*,"' 'CALCRIM No. 372 addresses flight "after the *crime was committed*."' By this argument, however, defendant simply repeats the contention that the CALCRIM instruction unconstitutionally presumes the crime was

committed, which we have rejected already. Accordingly, we do not address the argument further.

"In summary, defendant has failed to show any constitutional defect in the flight instruction given here." (*Paysinger, supra*, 174 Cal.App.4th at pp. 31-32.)

Regarding defendant's claim there was no evidence he fled to avoid detection of the charged offenses, we disagree. Several times when Miller called the police to report defendant's nocturnal presence in her home, defendant ran away before the officers arrived. After taking Miller's car keys, he also fled before the police arrived. When the officers found defendant, he ran from them and into a house, where he concealed himself in a bedroom closet. However, defendant argues this last flight may not be considered, because he was arrested as a parolee at large. Even if we accept defendant's argument and disregard the last flight, there is sufficient evidence of his prior flights from Miller's home after she called the police to support the trial court's decision to instruction the jury with CALCRIM No. 372.

IV. FAILURE TO INSTRUCT ON ELEMENTS OF THEFT

Acknowledging that the court instructed the jury with CALCRIM No. 1700, the standard instruction on burglary, defendant nevertheless faults the court for failing to instruct on the elements of theft.

A. Standard of Review

"Errors in jury instructions are questions of law, which we review de novo. [Citation.]" (*People v. Russell* (2006) 144 Cal.App.4th 1415, 1424.)

"'It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case.' [Citation.]" (*People v. Sedeno* (1974) 10 Cal.3d 703, 715, disapproved on another ground in *People v. Blakeley* (2000) 23 Cal.4th 82, 89 & *People v. Breverman* (1998) 19 Cal.4th 142, 163, fn. 10 & *People v. Flannel* (1979) 25 Cal.3d 668, 684-685, fn. 12.)

B. Analysis

Assuming, without deciding, the trial court erred in failing to instruct the jury on the elements of theft, we determine the prejudicial effect of instructional error under the *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*) standard and ask whether a reasonable probability exists that the outcome would have been different but for the error. (*People v. Flood* (1998) 18 Cal.4th 470, 489.)

Relying on *People v. Failla* (1966) 64 Cal.2d 560 (*Failla*), defendant argues the court's failure to instruct the jury on theft amounted to prejudicial error. In *Failla*, the defendant was charged with five burglaries arising out of nighttime entries into the apartments of five different female victims with the intent to commit a felony and theft. (*Id.* at p. 563.) In each of the burglaries, defendant committed some type of sexual offense, either having the victim masturbate him or watch him masturbate himself. (*Ibid.*) The jury was instructed on burglary pursuant to section 459 and that "a necessary element of burglary is a specific intent to commit theft 'or any felony.'" (*Failla*, *supra*,

at pp. 563-564.) On appeal, our state's highest court found prejudicial error "in failing to give a further instruction on its own motion defining 'felony' and advising the jury which acts the defendant, upon entry, may have intended to commit [that] would amount to felonies." (*Id.* at p. 564.) Defendant's reliance on this case is misplaced. The prejudicial error was not in failing to define theft, but in failing to define felony.

Given the facts of this case, we agree with the People and find the case of *People v. Corral* (1943) 60 Cal.App.2d 66 (*Corral*) to be instructive. In *Corral*, the defendant entered a department store with another man. In the men's suit department, the defendant took a suit and handed it to the other man. When the man could not put it under his coat, defendant took the suit back and put it down his trousers. The two then left the store. (*Id.* at p. 68-69.) Defendant was charged with burglary for allegedly entering the store with the intent to commit theft. (*Id*. at p. 68.) The jury was instructed on burglary pursuant to section 459. (*Corral*, *supra*, at pp. 70, 72.) On appeal, the defendant claimed the trial court erred by not further defining "theft," and thus, the jury was "left in ignorance of the precise nature of the intent on defendant's part which must be shown to support a conviction." (*Id.* at p. 72.) Rejecting the defendant's argument, the court stated: "Only one sort of theft—larceny—was indicated by the evidence, and the showing of defendant's intent to commit that crime is so clear that we do not see how the jury could have had any doubt about it, or misunderstood the instruction. [Citation.] Even if such an instruction should properly have been given here, its absence has not resulted in a miscarriage of justice." (*Ibid*.)

Here, the trial court instructed the jury on the elements of burglary, including the element of intent to commit theft or stalking. Given the clear evidence of defendant's intent to stalk Miller, there is no reasonable probability that the outcome would have been different but for the error.

V. UNANIMITY INSTRUCTION

Defendant contends that, because there were multiple entries into Miller's home in the summer of 2006 and the prosecution failed to specify which entry supported the charge of burglary in count two, the trial court erred in failing to give a unanimity instruction to the jury. We disagree.[3]

A. Additional Background Facts

In count 2 of the amended information, defendant was charged with entering Miller's home on or about August 21, 2006, with the intent to commit theft and a felony. According to the evidence, on the day of her daughter's birthday party in August 2006, Miller could not find her cell phone, which should have been in a purse she kept on the bedroom dresser. Her daughter said she had seen defendant that morning standing behind the bathroom door. Officer Sears was dispatched to Miller's home on August 21, 2006, and took a report from Miller about defendant being in the home. Defendant eventually returned the cell phone to Miller. The jury was instructed that a "burglary was committed if the defendant entered with the intent to commit theft or stalking."

[3] A unanimity instruction was given with respect to count one, stalking.

B. Analysis

Defendants have the constitutional right to a unanimous jury verdict. Such right requires that, when the evidence shows more than one unlawful act that could support a single charged offense, the prosecution must either elect which act to rely upon, or the trial court must sua sponte give a unanimity instruction telling the jurors they must unanimously agree which act constituted the crime. (*People v. Melhado* (1998) 60 Cal.App.4th 1529, 1534.) The unanimity instruction safeguards against the danger that a defendant will be convicted even though there is no single offense that all the jurors agree the defendant committed. (*Ibid*.)

"On the other hand, where the evidence shows only a single discrete crime but leaves room for disagreement as to exactly how that crime was committed or what the defendant's precise role was, the jury need not unanimously agree on the basis or, as the cases often put it, the 'theory' whereby the defendant is guilty. [Citation.]" (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.) Stated another way, "a unanimity instruction is not required if the evidence shows only a single crime, albeit committed in several possible ways. [Citations.]" (*People v. Wolfe* (2003) 114 Cal.App.4th 177, 184-185.) More to the point: Discrete crimes require unanimity instructions, theories of the case do not. (*People v. Russo, supra*, at p. 1132.) For example, a jury need not agree whether a defendant who commits a single burglary entered the residence with the intent to commit, for example, forced oral copulation or felony assault. (*Failla, supra*, 64 Cal.2d at pp. 567-568.)

Here, as noted above, stalking was charged in count one as a continuous offense occurring between June 26, 2006, and September 26, 2006. However, burglary was charged as occurring only on or about August 21, 2006. During closing argument, the prosecutor referred specifically to the entry when the cell phone disappeared and defendant was found hiding behind a door in the Miller's home. Because neither the amended information, nor the evidence or argument of counsel as to the events of August 21, 2006, established multiple entries, no unanimity instruction was required. Thus, we reject defendant's argument to the contrary.

VI. DEFENDANT'S PRIORS

Defendant complains the trial court's failure to advise him of the consequences of his admissions to the special allegations renders the admissions invalid because they were not knowing and intelligent. Specifically, he faults the trial court for never explaining "the increased exposure [he] faced on his sentence."

A. Additional Background Facts

Defendant waived jury trial on the allegations of his priors, and on September 28, 2007, he (with counsel) waived a court trial and admitted his prior serious felony and strike conviction, along with two prior prison terms. While the court specifically inquired about the constitutional rights defendant was waiving, there was no discussion about the penal consequences of his admissions. Instead, defendant said he wanted to stipulate to the priors and proceed with a "*Faretta* motion."[4] After further advisement by

[4] *Faretta v. California* (1975) 422 U.S. 806.

the trial court, along with defendant's execution of a "*Faretta*" form opting to represent himself, defense counsel was relieved on October 19, 2007.

On or about December 7, 2007, defendant asked to withdraw his admissions to his priors on the ground that his counsel failed to inform him of the penal consequences of such admissions. A hearing was held on May 16, 2008. Defendant called his trial counsel as a witness. Counsel described how he and defendant reviewed the prison packet, which contained the documentary proof of defendant's prior convictions, including photographs and fingerprints, and that the priors would add to the sentence defendant received. Counsel further testified that a fingerprint expert was present to print defendant and make the comparison. Although defendant informed counsel he would stipulate, defendant complained that the documents failed to show whether the prior conviction was invalid, and he asked for a transcript of the 1996 proceedings. The motion to withdraw was denied, and the case proceeded to sentencing.

B. Analysis

The California Supreme Court has adopted a judicial rule of criminal procedure requiring that a defendant be advised of his rights to a jury trial, to confront adverse witnesses, and to remain silent before the court may accept his admission to a prior conviction allegation. (*People v. Mosby* (2004) 33 Cal.4th 353, 359-360.) In the absence of a full advisement of all three rights, the court looks to the totality of the circumstances to determine whether an admission was voluntary and intelligent. (*Id*. at pp. 360-361.) Similarly, the court adopted a rule requiring that a defendant be advised of the penal consequences of the admission. (*In re Yurko* (1974) 10 Cal.3d 857, 864.) However,

failure to advise of the consequences requires the admission to be set aside only if the defendant can show that it is reasonably probable that he would not have made the admission if he had been advised of the consequences of doing so. (*People v. Walker* (1991) 54 Cal.3d 1013, 1022-1023.)

On appeal, defendant argues there is no evidence that his admissions were "intelligently made, under the totality of the circumstances." At best, he claims he was "misadvised" as to the consequences and made the admissions "in haste while he was considering another question entirely." While the record demonstrates that defense counsel advised defendant the priors would add to his sentence, defendant never made any further inquiry as to what the added sentence would be. The People note that defendant had access to the probation officer's report, which put defendant on notice of the recommended penal consequences of his priors. Both at his hearing to withdraw his admissions and on appeal, defendant has made no attempt to demonstrate prejudice from the court's failure to advise him of the consequences of his admissions. There has been no showing that it is reasonably probable defendant would not have made the admissions if he had been advised of the consequences of doing so. Accordingly, we reject the contention as forfeited. (*Paterno v. State of California* (1999) 74 Cal.App.4th 68, 106 ["[a]n appellate court is not required to examine undeveloped claims, nor to make arguments for parties."].)

VII. DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

HOLLENHORST
J.

We concur:

RAMIREZ
P.J.

KING
J.